No. 521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
Petitioner,

v,

SECURITIES AND EXCHANGE COMMISSION.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOMER CUMMINGS,
WILLIAM STANLEY,
WENDELL J. WRIGHT,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 521

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The Commission's brief in opposition seeks to make it appear that petitioner is asking this Court to "reweigh the evidence" in a case which is "essentially factual" (Br. in Opp., 11).[1] Neither suggestion is true. The facts of record are not disputed. The issues are purely questions of law.

---

[1] It may be noted that the Commission here (Br. in Opp., pp. 3-8), as did the court below (R. 2059-2061), has merely summarized the findings of the Commission—albeit with some verbal changes and embellishments so as to picture Public Service in an even more servile and unfavorable light than the Commission or the court below itself attempted.

I

An essential and basic issue here is the Commission's interpretation of the words "control" and "controlling influence" as they were used by Congress in Section 2(a)(8) of the Act. The Commission's brief in opposition attempts to make it appear that the issue is whether "present power to exercise control" is within the statute "whether or not it is actively exercised" (Br. in Opp., p. 12). Petitioner not only raised no such issue, but expressly disclaimed any such issue:

> Petitioner does not suggest that any company with present control of, or controlling influence over, another—whether exercised or not—does not render the latter a subsidiary within the meaning of the statute. (Petition, p. 30.)

The issue here is whether the statutory words "control" and "controlling" are to be taken—as petitioner contends—in their ordinary and intended meaning, or—as the Commission would have it—as "something less in the form of influence over the management or policies of a company, than 'control' of a company" (*H. M. Byllesby & Company, et al.*, 6 S. E. C. 639, 651). "We need not find that [a holding company] has the power to carry its point on every occasion" (*Koppers United Company*, S. E. C. Release No. 3812, September 29, 1942, p. 8). Here also the court below, quoting with approval from the decision of another circuit court of appeals, held that control

> does not necessarily mean that those exercising controlling influence must be able to carry their point. A controlling influence may be effective without accomplishing its purpose fully. (R. 2063.)

In this case, moreover, because of the vague nature of its findings, we do not know how much less than "control"

or "controlling influence" the Commission regards as sufficient to subject parties to the pains and penalties of the statute.

It is plain, however, that the Commission and the court below interpret "control" as "something less * * * than 'control'." In so doing they depart from the statute, disregard the express intention of Congress, and in fact depart from the Commission's position previously announced to this Court. On the single occasion when the statute was before this Court for oral argument, the Commission took a very different view, italizing its words:

> A holding company, by express definition * * * is a company which *actually controls* operating companies * * * Conversely, a subsidiary company, by express definition * * * is a company *actually controlled* by the holding company, and not simply a company in which the holding company has a substantial interest. (*Electric Bond & Share Co.* v. *Securities and Exch. Comm.*, Br. for Resp., Appendix A, p. 6, decided by this Court in 303 U. S. 419.)

It was there announcing its interpretation in the very words of the legislative history of the provision as stated on the floor of the Senate by the committee chairman in charge of the measure:

> Even if they hold 40 per cent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word "control" is defined in the bill. (79 Cong. Rec. 8397.)

See to the same effect 79 Cong. Rec. 8439. This position was announced upon a background of specific consideration of the provision in question. As shown by the report of the Senate committee on the bill which finally became

law, the provision was "completely rewritten in the interests of clarity and definiteness" to substitute "controlling influence" for the previous proposal specifying only "material influence" (Sen. Rep't No. 621, 74th Cong., 1st Sess., p. 5).

The Commission thus seeks to have this Court approve administrative and judicial nullification of the deliberate language of the national legislature. Since Section 2(a)(8), and its corollary Section 2(a)(7), embody pivotal provisions of the Act, an important and recurring issue of federal law is presented which should be settled by this Court.

II.

A second basic issue—and one solely of law—is the propriety of the Commission's grouping of "UGI and United" or "UGI-United" in order to make it appear that an overwhelming block of voting securities is held by a joint or single interest. The issue is crucial because upon it depends all of the Commission's reasoning and findings both as to the voting power of "UGI and United" over Public Service (R. 27-31, 45, 46-47, 48) as set forth in Point I of the petition (pp. 17-39) and the "historical relationship" between Public Service and "UGI-United" (R. 31-44, 45, 47-48) as set forth in Point II of the petition (pp. 39-49).

The Government now takes contradictory positions on this issue. It both defends and denies joining UGI and United, stating (a) that the statute requires the Commission to make the assumption, (b) that neither UGI or United contested the relationship assumed by the Commission, (c) that petitioner made no attempt to disprove the Commission's assumption, (d) that the evidence would support findings that each or either UGI or United controls or exercises controlling influence over Public Service, and (e) that the Commission did not consider them as jointly controlling Public Service but found that they singly

did so (Br. Opp., pp. 12-15). None of these is sound in law or founded in fact.

(a) The statute does not require or permit the Commission to lump UGI and United into a single entity for the purpose of determining control or controlling influence over Public Service. The statute provides no more than that, wherever there is a 10% or more voting security ownership by "a specified holding company," one or the other of the companies involved may file its application for a declaration of status, which the Commission must determine in the light of the facts presented of record. The statute itself provides that the filing of the

> application * * * in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company * * * until the Commission has acted upon such application. (Section 2(a)(8).)

To construe the statute as setting up a presumption, conclusive or even evidentiary, would require this court either to declare the statute invalid or to overrule its previous decisions. *Miller* v. *United States,* 294 U. S. 435, 440; *Heiner* v. *Donnan,* 285 U. S. 312, 329; *Manley* v. *Georgia,* 279 U. S. 1, 6; *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, 642-644; *Mobile etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43.[2]

---

[2] The Commission quotes at length (Br. in Opp., pp. 13-14) from *Morgan Stanley & Co.* v. *Securities Exchange Commission,* 126 F. 2d 325, 328 (C. C. A. 2) as sustaining "the Commission's comparable treatment of the statutory parent-subsidiary relation as conclusive." But that case did not involve Section 2(a)(8) but Section 2(a)(11)(D) relating to affiliates and applying to corporations where "there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate * * * that such person be subject to the obligations, duties, and liabilities imposed in this title upon affiliates." It involved, more particularly, the application of one of the Commission's rules relative to underwriters' fees. The dicta of the court there was, con-

Even if the statute were to be construed as erecting an ordinary presumption, the situation is still no different, for Public Service has come forward with at least a prima facie case as to its independence from any actual, direct, or indirect control or controlling influence on the part of UGI or United (Petition, pp. 7-9). Consequently,

> the presumption falls out of the case. It never had and cannot acquire the attribute of evidence * * * The issue must be resolved upon the whole body of proof pro and con. (*Del Vecchio* v. *Bowers,* 296 U. S. 280, 286-287.)

And see to the same effect *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161, 171; *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 507; *Mobile, etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43.

(b) It is immaterial that, as the Government states (Br. in Opp., p. 13), neither UGI or United have appeared in these proceedings to contest the Commission's assumption that United actually controls UGI. Neither UGI, United, or petitioner had notice of any such issue. The Commission's notice of hearing contained no specification of any such issue (R. 1815-1816). No one, therefore, before or during the proceedings had the notice to which they are entitled by the rules of fair procedure and due process of law. *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206; *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498; *Labor Board* v. *Mackay Co.,* 304 U. S. 333, 350; *Edison Co.* v. *Labor Board,* 305 U. S. 197, 234.

Moreover, upon receipt of the Commission's notice of hearing, United Corporation denied that it "directly or

---

sequently, wholly gratuitous. In the present case, moreover, Public Service is admittedly an affiliate by virtue of Section 2(a)(11)(A) because of the ownership of "5 per centum or more of the outstanding voting securities" each by UGI and United; and Public Service not only has no desire to escape from the disabilities of affiliates but, in its petition (pp. 36-37, 38-39), stresses that status as protecting it from any possible control or influence on the part of UGI or United.

indirectly'' exercised a controlling influence over the management and policies of Public Service, and declined to participate in the proceeding (R. 1120). UGI did the same (R. 1121-1122). They may never have occasion *inter se* to test their relationship, and certainly their forbearance cannot bind Public Service. Even had there been a decision in a proceeding involving those parties, it would not be *res adjudicata* as to Public Service if the latter had not been a party in the proceeding. *A fortiori,* there never having been such a proceeding, Public Service cannot be bound.

(c) The Commission contends that petitioner ''made no attempt to prove that UGI is not, in fact, subject to United's control or controlling influence'' (Br. in Opp., p. 13). But petitioner has done all that it could and all that it is required to do respecting the interrelation of UGI and United. In its application for declaration of status, petitioner pleaded that)R. 1106)

> neither the said United Gas Improvement Company nor said United Corporation, *either separately or jointly,* exercises any control or controlling influence over the policies and management of applicant. (Emphasis supplied.)

From the Commission's files, petitioner secured and introduced the disclaimers and declinations of UGI and United (R. 133, 1120-1122). Petitioner also secured and introduced various statements and declarations of both UGI (R. 1116-1117) and United (R. 1117-1119) filed with the Commission disclaiming either direct or indirect control over Public Service. By the rules of evidence in law and at equity, to say nothing of the more liberal rules applicable in administrative proceedings, those items are evidence; and there is nothing in the record to rebut them. They are declarations made by parties who knew the facts,

they were required to be filed with a public authority under pains and penalties of law for misstatement, and as statements of fact they have never been questioned by the Commission through submission of counter evidence. They were not merely admissible and actually admitted in evidence (R. 132-133) but they are entitled to weight as evidence and as the sole evidence of record.[3]

Moreover, there was nothing further which, as a practical matter, petitioner could do, for it has no visitatorial, inquisitorial, or other investigating powers which would enable it to go into files and records or take sworn testimony in private or otherwise discover the existence of documentary or testimonial evidence. The Commission, and the Commission alone, has those powers (Section 18). The Commission will issue subpoenas at the instance of private parties only where the latter specify "the documents desired and the facts to be proved by them, in sufficient detail to indicate the materiality and relevance of the documents desired" (Rules of Practice, V(g)). Without investigatory powers, petitioner is wholly unable to discover evidence upon which to request the issuance of administrative subpoenas.

---

[3] At the administrative hearing the only objection of counsel for the Commission was not that these items of documentary evidence were not evidence, but that they were "entitled to very little weight" (R. 132). This Court has uniformly and invariably approved as both admissible and entitled to weight as evidence corporate books, statements, or declarations of various kinds. These include books of a public utility "kept in the ordinary course under general supervision" of a state administrative agency (*Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 176); published price lists and market reports with reference to questions of value (*Virginia* v. *West Virginia*, 238 U. S. 202, 212); books of account and letters (*American Surety Company* v. *Pauly* (No. 1), 170 U. S. 133, 159; *American Surety Company* v. *Pauly* (No. 2), 170 U. S. 160, 172), declarations of ownership published in a newspaper (*Dunlop* v. *United States*, 165 U. S. 486, 492), reports made "in the course of * * * official duty" (*Vicksburg, &c., Railroad Co.* v. *Putnam*, 118 U. S. 545, 553), and the official records of a corporation (*Owings* v. *Speed*, 5 Wheat. 420, 423-424).

(d) The Government here takes the position that "the stock ownership of *each* of the holding companies and the evidence as to the participation of *each* in petitioner's affairs" would support a ruling that either one or the other controlled or exercised a controlling influence over Public Service (Br. in Opp., pp. 14-15). In the first place, the Commission has not attempted to find the relationship between Public Service and either UGI or United separately. Courts cannot review the question because they would be usurping the administrative function in doing so. "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201; *Florida* v. *United States*, 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 59; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511. Only the Commission is authorized to make findings; and it does not lie in the Government's power to remake the case, upon the record or otherwise, in the guise of supporting the Commission's order.

Moreover, the suggestion is absurd that Public Service is controlled by, or subject to the controlling influence of, United apart from UGI and without UGI's holdings in Public Service. With 13.9% of the voting securities, United manifestly could do nothing as against the strongly organized New Jersey interests or the institutional investors or the other stockholders generally; and, the few "historical" contacts between United and Public Service were of short duration, slight, and without significance as set forth in the petition (pp. 46-48) and Appendix (pp. 67-71). Conversely, UGI alone is in no position of control or controlling

influence, latent or otherwise, for the many reasons set forth in the petition (pp. 32-46).

(e) Finally, the Government concludes on this issue with the assertion that the Commission itself treated UGI and United separately and found control or controlling influence in each of them individually (Br. in Opp., p. 15). Its only support is that in one reference (R. 49) the Commission used the phrase "United *or* UGI" (emphasis supplied). The answer is that, for twenty pages (R. 29-49) and even on the very page where the one variation occurs (R. 49), the Commission speaks only in terms of "UGI and United" or "UGI-United".[4] If the single reference, in its ultimate conclusion, to "United or UGI" is to be taken as the Government here urges, then that conclusion is supported by none of the basic or subsidiary findings and conclusions of fact, and the order of the Commission should be reversed for lack of findings of fact. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506; *Florida* v. *United States*, 282 U. S. 194, 208. It therefore does not aid the Government to say that, in its ultimate conclusion, the Commission has taken a different view; for such a course leaves the basis for the order, in the words of Mr. Justice Brandeis,

---

[4] The final use of "or" rather than "and" or "—" does not imply that the Commission intended to conclude that either UGI or United alone could control or exercise a controlling influence upon Public Service without the aid of the other. Indeed, in view of every other expression in its lengthy opinion, the Commission necessarily meant that ultimate control or controlling influence was in either United or UGI but only with the aid of the other. Logically, the Commission should have concluded that control was in United, for the Commission's own assumption is that United controls UGI. Except in cases of combination or conspiracy, control is commonly conceived as lying in some one entity. Moreover, the statute itself requires that subsidiary status be determined with reference to "a specified holding company" (Section 2(a)(8)). This difficulty seems to be the only reasonable explanation for the variation in phraseology in the Commission's ultimate conclusion.

> entirely to inference. This complete absence of "the basic or essential findings required to support the Commission's order" renders it void. (*United States* v. *B. & O. R. Co.*, 293 U. S. 454, 463, citing *Florida* v. *United States*, 282 U. S. 194, 215, and other cases.)

Plainly, in the assumption of the "UGI-United" entity or combination, the Commission seeks to make it impossible for a party to have an actual and factual determination of the real issue as Congress intended. In the court below that was the Commission's position, for it there said:

> Any other course would require the Commission to try a number of issues concerning control in each case. (Br. for Respondent, p. 13.)

The Commission thus seeks this Court's approval for its declination to assume the administrative duties which Congress has specifically imposed upon it.

III.

A third issue of law, arising both under the statute and Constitution and applicable to the administrative process generally, is the novel position of the Commission that it is not required to make a positive finding but may decline to do so—and thus decline to relieve petitioner of the status of subsidiary—merely because it chooses to say that it is not convinced of petitioner's independence (R. 27, 45-46). It seeks, by assumed analogy, to arrogate to itself the common law chancellor's discretion. It states to this Court that the issue "is whether petitioner sustained the burden" (Br. in Opp., p. 9) and insists that

> petitioner's burden was to convince the Commission. (Br. in Opp., p. 16)

By footnote it seeks to bolster this theory by reference to rules regarding strict construction of provisos and excep-

tions in statutes (Br. in Opp., p. 10, n. 2). But this proceeding is one for the determination of factual status. Moreover, the proceeding is not one before a chancellor for the issuance of a prerogative writ, but it is a statutory proceeding devised by Congress and governed by the terms of the statute.

Upon this theory the Commission seeks to escape from the settled rule that positive findings and conclusions are required to support administrative orders. Here there is no "definite finding" (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202), none that are "specific on [the] ultimate and determinative issue" (*United States* v. *Pyne*, 313 U. S. 127, 130). Where there are "vague findings", as this Court has recently said, "statutory rights will be whittled away" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489). Here, according to one of the chief sponsors of the statute in Congress, "the Commission is directed to make a finding" (79 Cong. Rec. 8397), but it chooses instead to say merely that it is not convinced. "Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency" (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510). The question is important and requires full consideration and review by this Court, for it applies to great and growing segments of the field of administrative law.

It is worthy of final note, moreover, that the Commission has not sought to apply separately the three applicable tests prescribed by the statute:

> (1) whether "the applicant is * * * controlled, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever";
>
> (2) whether "the management or policies of the applicant are * * * subject to a controlling influ-

ence, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons)"; and,

(3) in the latter event, whether the controlling influence is such "as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

In its discussion it combines (1) and (2) into the phrase "control or controlling influence," without any specification whatever as to any "arrangement or understanding" or "means or device" through which it apprehends such control or controlling influence in the instant case—other than the assumed joint stock ownership. It makes no attempt whatever to apply the third standard to the facts here, although in earlier opinions involving other parties it has been careful to do so. E.g., *West Penn Railways Company*, 2 SEC 992, 995-996; *H. M. Byllesby & Company et al.*, 6 SEC 639, 655-656. In this latter respect, therefore, it has not even attempted to apply the statute as Congress intended but at most has "determined only the dry legal question of its power." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 196.

IV.

The Government here does not attempt to justify the very numerous, gross, and material departures of the Commission's findings from the sole and undisputed evidence of record as set forth in Point II of the petition (pp. 39-49) and the Appendix (pp. 22-73). This issue is not one of fact but of law. In the words of Mr. Justice Brandeis, "An order based upon a finding made without evidence * * * or upon a finding upon evidence which clearly does not support it * * * is an arbitrary act" and as such "a denial of due process." *Northern Pacific* v. *Dept. Public Works,*

268 U. S. 38, 44-45. "A finding without evidence is arbitrary and baseless" and any other rule "would nullify the right to a hearing." *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 91, 93.

> Even though the inaccuracies alluded to may have been caused solely by inadvertence rather than by arbitrary or capricious action, they nevertheless show that the Commission's decision was not based upon that careful consideration of the evidence which is properly, to be expected from an unbiased body of experts discharging a function so important from the standpoint of both the parties and the public. (*Saginaw Broadcasting Co.* v. *Federal C. Com'n*, 96 F. 2d 554 563-564 (D. C. App. 1938), cert. denied 365 U. S. 613.)

The right to a fair hearing and a fair decision for all parties is no less essential because large business interests are here involved, for civil rights will not long survive if protected only in some of the people.

V.

Due regard for the intention of the coordinate legislative branch of the Government—as well as grave questions of statutory construction, fair hearing, and methods of administrative decision—requires that this Court exercise its supervisory power to review the proceedings herein.

Respectfully submitted,

HOMER CUMMINGS,
WILLIAM STANLEY,
WENDELL J. WRIGHT,
Counsel for Petitioner.

CUMMINGS & STANLEY,
Of Counsel.

December, 1942.

(3512)